

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1104

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-1104

BPK

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,
V.
RONALD A. STRINGER,
DEFENDANT-APPELLANT.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF APPELLANT
RONALD A. STRINGER



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STATEMENT OF THE ISSUES

- I. THE COURT COMMITTED REVERSIBLE ERROR BY ALLOWING INTO EVIDENCE A PHOTOCOPY OF A BAIT MONEY LIST SINCE THIS LIST WAS HEARSAY.
- II. THE COURT COMMITTED REVERSIBLE ERROR IN INSTRUCTING THE JURY ON "FORCE AND VIOLENCE" WHEN THIS ELEMENT WAS NOT CHARGED IN THE INDICTMENT.
- III. THE COURT COMMITTED REVERSIBLE ERROR IN FAILING TO PROPERLY INSTRUCT THE JURY THAT A PRINCIPAL MUST EXIST FOR THE APPELLANT TO BE GUILTY OF AIDING AND ABETTING.
- IV. THE COURT ABUSED ITS DISCRETION IN REFUSING TO EXCLUDE EVIDENCE OF APPELLANT'S 1971 HEROIN CONVICTION UNDER RULE 609, FEDERAL RULES OF EVIDENCE.

STATEMENT OF THE CASE

This is a direct appeal from a judgment of conviction on a two-count indictment charging the appellant, Ronald A. Stringer, with the robbery of a federally insured loan association in violation of Title 18, United States Code, Sections 2113(a) and 2, and with conspiracy in violation of Title 18, United States Code, Section 371. Trial in the case commenced on January 18, 1977, before The Honorable T. Emmet Clarie, United States District Judge, and the jury returned a verdict of guilty on both counts on January 21, 1977. On February 22, 1977, Judge Clarie sentenced the appellant to a term of nine years on the bank robbery count and a term of five years on the conspiracy count and ordered that both sentences run concurrently.

The government's case rested primarily on the testimony of an unindicted co-conspirator, Christine Doolittle, who was fourteen at the time of the robbery of the Permanent Savings and Loan Association in Meriden, Connecticut (App. 76, 77-80, 84-86). Doolittle testified that she robbed the bank on January 9, 1976, with the assistance of Stringer and a third party whose identity was unknown (App. 81-84, 87-88, 91). She claimed that Stringer provided her with a toy gun and a demand note and that he picked her up in a Cadillac after the robbery which she committed herself (App. 94). Stringer denied

all these allegations and put on evidence that he was in the Ramada Inn in East Hartford the evening of the robbery (App. 107-111). Doolittle had testified she and Stringer had spent the night at the Holiday Inn in Hartford (App. 97-98, 100).

Doolittle testified that Stringer had forced her to use drugs on three occasions prior to the robbery and had purchased cocaine for her on the evening following the robbery (App. 87, 90-91, 99). Prior to trial appellant had unsuccessfully sought to prohibit the use of Stringer's drug conviction for impeachment purposes. Following the conclusion of the government's case in chief, the appellant again sought to preclude use of the prior conviction (App. 103-106, 113-115). All such motions were denied. Appellant's prior drug conviction was elicited from him on cross-examination (App. 112).

ARGUMENT

- I. THE COURT COMMITTED REVERSIBLE ERROR BY ALLOWING INTO EVIDENCE A PHOTOCOPY OF A BAIT MONEY LIST SINCE THIS LIST WAS HEARSAY.

In order to establish that the appellant, Ronald A. Stringer, had bank bait money on his possession on January 10, 1976, the government put into evidence a document which purported to be a copy of a bait money list (App. 49, 50-56, 101-102). This process was accomplished through the testimony of the witness Joseph Campbell who was the Vice President and Security Officer of the robbed bank on January 9, 1976.

Campbell was allowed to testify over the objection of counsel (App. 50-53) that all tellers at the Permanent Savings and Loan Association retained bait money in their teller drawers (App. 53-54). But the list that he presented and the government placed into evidence as Government Exhibit No. 2 (App 6a) was not the original list which was made by some teller and retained by head teller Charlotte Dirgins, but a photocopy of the original which he had retained (App. 55-61, 67-68). There was no testimony whether he had ever even seen the original bait money list.

More importantly, the bank officer testified that he had no idea when either the original list was made up or when the copy was produced nor could he furnish the name of the

person who made the list or copied it (App. 50, 58, 68). Campbell could not verify that the Federal Reserve Note serial numbers on the teller's drawer at the time of the robbery on January 9, 1976, matched the serial numbers on Exhibit No. 2 (App. 61). He further stated that the bait money lists, such as Exhibit No. 2 (App. 6a), are prepared irregularly, are not audited, and could be as much as six months old before new ones are prepared (App. 61).

Maureen Reed, the teller at the window which was robbed, testified that she matched the original bait money list with the money in her drawer about a month and a half prior to the robbery of January 9, 1976 (App. 71-72, 74-75). The list which she utilized, however, was not the same list retained by Campbell and which was put into evidence as Government Exhibit No. 2 (App. 6a). Nor was there any testimony that anyone compared Campbell's copy with the original list or with the testimony in Reed's drawer at or about the time that Reed took over window number 10. There was not even any testimony that prior to trial anyone compared the original list with Government's Exhibit No. 2 (App. 6a).

The copy of the bait money list was excludable as inadmissible hearsay. Rules 801, 802, Federal Rules of Evidence. It would appear from the record, however, that despite strenuous objection from counsel, this list was allowed into evidence under the so-called business record

exception to the hearsay rule. Rule 803(6), Federal Rules of Evidence (App. 50-54, 62-66). This exception reads, in part, as follows:

(6) RECORDS OF REGULARLY CONDUCTED ACTIVITY. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness [Emphasis added] Fed. R. Ev. 803(6).

The evidence in the case shows that Campbell could not tell when the copy of the bait list was made or even whether the original list was made "at or near the time" the bait money was placed in the teller's drawer (App. 57). Similarly Campbell could not answer whether the list was made by "a person with knowledge" of the bait money in drawer 10.^{*/} In fact, on cross-examination by the court, Campbell conceded he did not even know who prepared Government's Exhibit No. 2 (App. 58). The testimony of the teller Maureen Reed provided

^{*/}This provision of Rule 803(6) is itself an expansion of the common law which required the maker of the entry to have personal knowledge. 5 Wigmore on Evidence, § 530 at 449 (Chad. Rev. 1974). Therefore, the new rule allowing entry to be made by one who has information transmitted by another having personal knowledge should be narrowly construed.

no assistance to the government in the case since she also did not know when or by whom Campbell's copy had been prepared.

Even if this court concludes that all the elements of Rule 803(6) have technically been met, appellant contends that the circumstances of the preparation of the bait money list are lacking in trustworthiness.

Evidence that is otherwise admissible under one exception to the hearsay rule is admissible primarily because evidence of that kind is generally trustworthy, but if in a particular instance the circumstances indicate a lack of trustworthiness, the evidence should be excluded. United States v. Robinson, 544 F.2d 110, 115 (2d Cir. 1976).

Whether or not the copy of the bait money list which Campbell had in his possession was trustworthy is highly problematic. No one could claim they compared the copy with the original. Undoubtedly, the copy was an exact duplicate of the original at some point prior to Maureen Reed assuming the teller job at window number 10. But many months could and probably did elapse between the preparation of the photocopy and Maureen Reed's checking of the bait money with Charlotte Dirgin's original list (App. 72-74, 75). The original could have been changed by deletions or interlineations. It would have been an easy matter to submit the original into evidence or for bank personnel, such as Campbell, to at least compare the original list with his copy before testifying in court. The government's failure to follow either of these

two approaches rendered Exhibit No. 2 untrustworthy and inadmissible. cf. United States v. Isenberg, 343 F. Supp. 25 (W.D. Pa. 1972), aff'd 475 F.2d 1397, cert. denied, 412 U.S. 941 (1973).

II. THE COURT COMMITTED REVERSIBLE
ERROR IN INSTRUCTING THE JURY ON
"FORCE AND VIOLENCE" WHEN THIS
ELEMENT WAS NOT CHARGED IN THE
INDICTMENT.

The appellant was charged in the indictment with robbing the Permanent Savings and Loan Association of Meriden by intimidation. Title 18, United States Code, Section 2113(a), sets forth two methods for violating its provisions -- by "force and violence," or "by intimidation." United States v. Jacquillen, 469 F.2d 380, 386 (5th Cir. 1972), cert. denied, 410 U.S. 938 (1973). Obviously, in many instances where a bank robbery had occurred, there will be sufficient evidence that both types of activity have occurred.

In the present case, there was evidence of intimidation based on the teller's reading a threatening demand note given to her by the bank robber, the use of an apparently real gun by Doolittle, and the teller's conclusory testimony of fright (App. 69-70). In light of these circumstances, the jury may have concluded that Maureen Reed and other bank personnel were put in fear or intimidation.

On the other hand, proof of fear is "inferred from conduct, words or circumstances reasonably calculated to produce fear." United States v. Jacquillen, supra at 386; United States v. Meeker, 527 F.2d 12, 15 (9th Cir. 1975). The fact a teller claims at trial that she was frightened during the robbery is not conclusive proof of the element of intimidation. United States v. Robinson, 527 F.2d 1170 (6th Cir. 1975).

The age of this robber at the time of the offense was fourteen, and she used a toy gun purchased at a local store (App. 76, 89). She appeared to people in the bank to be very scared and nervous (App. 75a, 93, 96a). Doolittle first approached a receptionist and showed her the demand note (App. 95-96) but received no reaction other than being referred to a teller (App. 95). Such behavior on the part of bank personnel is at least some indication that a reasonable ordinary person might not feel intimidated under these circumstances. The irrational fear of one teller does not provide an answer to the question of intimidation. United States v. Meeker, supra; Cole v. United States, 327 F.2d 360 (9th Cir. 1964).

The court, however, charged the jury on "force and violence" even though such a charge went beyond the allegations of the indictment and even though there was no evidence of force (App. 16-17). The mere display of a toy gun, no matter how real and intimidating it might appear, does not constitute force. While a fourteen-year-old girl may intimidate people with threats and gestures, actual physical contact or a real gun would be required for a finding of force or violence.

This court should not speculate and assume that the jury found sufficient evidence of intimidation. United States v. Clark, 475 F.2d 240, 249 (2d Cir. 1973). Based upon the court's unnecessary "force and violence" instruction (App. 16-17, 45), the jury may well have based its verdict of guilty on those

words and not on a finding of intimidation. The court further exacerbated the problem by failing to advise both counsel prior to summation of its proposed instructions. United States v. Conlin, No. 76-1346 (2d Cir., March 17, 1977). If it had properly followed Fed. R. Crim. P. 30, the appellant would have corrected the court in time to avoid prejudicing the appellant.

III. THE COURT COMMITTED REVERSIBLE
ERROR IN FAILING TO PROPERLY
INSTRUCT THE JURY THAT A PRIN-
CIPAL MUST EXIST FOR THE
APPELLANT TO BE GUILTY OF AID-
ING AND ABETTING.

It is axiomatic that the court must instruct the jury on each and every element of the crime charged in the indictment. This is true even if evidence of one or another element is overwhelming. United States v. Monteil, 526 F.2d 1008, 1010 (2d Cir. 1975); United States v. Natale, 526 F.2d 1160 (2d Cir. 1975), cert. denied, 96 S. Ct. 1724 (1976). "Failure to charge each element of the offense may be reversible error even where the elements not charged have been wholly uncontested by the defendant." United States v. Howard, 506 F.2d 1131, 1134 (2d Cir. 1974). The plea of not guilty places every issue in doubt and not even undisputed fact may be removed by direction or by omission in the charge. United States v. Natale, supra at 1167.

While the law does not require the prosecution of a principal, or even the revelation of that principal's identity, such a principal must exist beyond a reasonable doubt for a jury to convict a defendant for aiding and abetting. Oliphant v. United States, 525 F.2d 505 (9th Cir.), cert. denied, 96 S. Ct. 1473 (1975); United States v. Campbell, 426 F.2d 547 (2d Cir. 1970); Feldstein v. United States, 429 F.2d 1092 (9th Cir.) cert. denied, 400 U.S. 920 (1970). The standard work of

proposed jury instruction recognizes this principle and sets forth a three-paragraph aiding and abetting instruction. 1 Devitt & Blackmar, Federal Jury Practice and Instructions, 218-219 (1970).

While the court correctly charged on some of the components of aiding and abetting, it failed to mention that the jury must find a principal actually existed and committed the other elements of bank robbery. Title 18, United States Code, Section 2113(a) (App. 21). The defendant properly objected to this omission, but the court refused to correct its erroneous charge (App. 45-46). The fact, as the court stated, that a bank holdup by Doolittle was obvious does not negate the necessity for an instruction. United States v. Natale, supra.

IV. THE COURT ABUSED ITS DISCRETION
IN REFUSING TO EXCLUDE EVIDENCE
OF APPELLANT'S 1971 HEROIN CON-
VICTION UNDER RULE 609, FEDERAL
RULES OF EVIDENCE.

Impeachment of witnesses by prior convictions is governed by Rule 609 of the Federal Rules of Evidence. It is apparent that the Rule embodies both the policy of encouraging defendants to testify by protecting them against unfair prejudice and the policy of protecting the government's case against unfair misrepresentation of an accused's non-criminality. Under Rule 609(a), Appellant Stringer's 1971 conviction for the drug possession, a crime not involving dishonesty or false statement, is admissible only if the court determines that its probative value with respect to the appellant's credibility substantially outweighs the prejudice to him.

A. Crimes Involving Dishonesty
Or False Statement.

A prior conviction for the sale of heroin cannot be considered under the classification of crimes termed "crimen falsi." In United States v. Millings, 535 F.2d 121 (D.C. Cir. 1976), the court disallowed the impeachment of the defendant who admitted under cross-examination that he had in the past pled guilty to a charge of possession of heroin. The opinion quoted from the Joint Explanatory Statement of the Committee of Conference of the House and Senate,

which reported out the bill that enacted the Federal Rules of Evidence:

By the phrase "dishonesty and false statement," the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involved some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully. United States v. Millings, supra at 123.

Certainly, it cannot be said that in the instant case, Appellant Stringer's conviction for drug sales is "peculiarly probative of credibility." While it may be argued that any intentional violation of law indicates a disregard for all legal obligations, Congress has not adopted that expansive theory.

B. Probative Value As Opposed To Prejudicial Effect.

Several factors to be considered in this determination were outlined by the Second Circuit in United States v. Palumbo, 401 F.2d 270 (2d Cir. 1968). That court held that a trial judge might exclude evidence of prior convictions if:

. . . he finds that a prior conviction negates credibility only slightly but creates a substantial chance of unfair prejudice, taking into account such factors as the nature of the conviction, its bearing on veracity, its age, and its propensity to influence the minds of the jurors improperly. United States v. Palumbo, supra at 273.

In Palumbo the prior conviction was not excluded for impeachment purposes since the court reasoned that a crime involving fraud and stealing was highly probative on the issue of credibility despite the obvious prejudice. The facts in United States v. Puco, 453 F.2d 539, 542, 543 (2d Cir. 1971), are similar to the ones in the instant case. There, the defendant was convicted of selling cocaine illegally and had a 21-year-old prior conviction for the same offense. While the time span between convictions was noted by the court, it felt that it is better not to establish rigid age limitations on the use of prior convictions for impeachment purposes. Additionally, the court went on to say that:

The chance of prejudice resulting from admission of prior convictions for crimes similar to the one for which a defendant is on trial may be greatest in the case of narcotics convictions because of the widely accepted belief that persons previously convicted of narcotics offenses are likely to be habitual offenders. Ibid. n.9, p. 542.

Ultimately, the court held that ". . . a narcotics conviction has little necessary bearing on the veracity of the accused as a witness."

While the crime for which appellant was convicted in 1971 was different than the acts involved in the present case, strong similarities exist. The government repeatedly elicited from Christine Doolittle that Stringer forced her to use drugs prior to the robbery and purchased cocaine for her later that

evening. Under these circumstances, the crimes appear similar, and the jury may have convicted Stringer on a firm belief in his narcotics involvement and not upon a belief beyond a reasonable doubt that he aided the robbery of a bank.

C. Importance of Appellant's
Testimony.

The importance of the appellant's testimony is one of the factors that have to be weighed if the prior convictions are to be admissible. When the prior convictions are not relevant to credibility and the risk of prejudice is great, it is more important that the jury have the benefit of the appellant's version of the case than to have the appellant remain silent out of fear of impeachment.

The far more prejudicial effect that knowledge of an appellant's prior conviction has on a jury has been statistically recognized in a study done by Kalven and Zeisel, The American Jury 160 (1966). The data indicated that when a defendant's criminal record is known and the prosecution's case has contradictions the defendant's chances of acquittal are 38%, compared to 65% otherwise. This is not a case where the appellant's evidence was cumulative nor could he have allowed others to establish his defense. cf. United States v. Ortiz, No. 76-1460 (2d Cir., April 1, 1977). Only the Appellant Stringer could offer evidence that he did not aid or abet the robbery of the Permanent Savings and Loan Association and only he could

testify that he was not with Christine Doolittle on the afternoon of January 9, 1976. More importantly, he made the court aware of the value of his testimony by a pretrial motion and affidavit (App. 113-115). United States v. Ortiz, supra at 2794. The appellant was caught in the dilemma of remaining silent and thus not challenging Doolittle's testimony or testifying and being prejudiced by a narcotics violation.

In the situation here, when weighing the importance to the appellant of being able to testify against the highly prejudicial and inflammatory effect that introduction of his similar prior conviction would have on the jury, and its relatively little probative value, this court can reasonably conclude that Appellant Stringer's motion to suppress his prior conviction should have been granted.

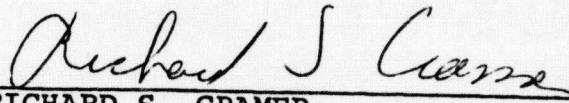
Defense counsel did not refer to the appellant's character as being "pristine" in nature and in fact allowed impeachment by a prior larceny conviction. The court did not even hold a hearing to determine the specifics of Stringer's prior conviction to determine if deceit or dishonesty was involved. United States v. Ortiz, supra at 2798-2799 (Mansfield, J. dissenting).

It is respectfully submitted that the trial judge abused his discretion in not suppressing the appellant's 1971 narcotics conviction since it was not a crime involving dishonesty or false statement and its certain prejudice far outweighed any probative value regarding the appellant's credibility.

CONCLUSION

For the foregoing reasons, the judgment of conviction should be vacated and the case remanded to the District Court for a new trial.

Respectfully submitted,

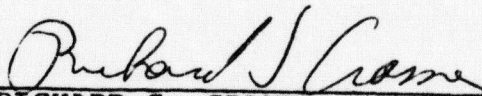


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Dated: April 25, 1977

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of Appellant Stringer's brief and appendix were hand-delivered to the Office of Thomas P. Smith, Esq., Assistant United States Attorney, 450 Main Street, Hartford, Connecticut 06103, this 25th day of April, 1977.



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